

Fogia Vs. State of Rajasthan and another

Date of Judgment: Sept. 21, 2006

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

REPORTABLE BY THE COURT: (PER HON'BLE MR.MATHUR J.)

1. By way of instant petition under Article 226 of the Constitution of India, petitioner has challenged the order of State of Rajasthan, passed by Deputy Secretary, Department of Home, whereby he has been directed to be detained in jail under Section 3(1)(b) of the National Security Act, 1980, hereinafter referred-to as "the NSA", pending deportation proceedings.

2. It is averred that petitioner Fogia, an unmarried person, has been residing in Village Khuiyala, District Jaisalmer, the place of his birth, since 1943. His parents were also born and lived in the same village.. Thus, he claims to be indian citizen in terms of Section 3(1) (a) & (b) of the Indian Citizenship Act, 1955, hereinafter referred-to as "the Act of 1955. It is also averred that the names of parents of petitioner have appeared in the voters list of village Khuiyala. It is further averred that on 12.11.1993, he was arrested in the name of Khania son of Talib for the offence under the Narcotics Drugs & Psychotropic Substances Act, in short "the NDPS Act", and Section 14 of the Foreigners Act, 1946, hereinafter referred-to as "the Act of 1946". An F.I.R. was lodged by one Ramnath Subedar at Police Station, Mohangarh, on 12.11.1993 stating inter alia that four persons were seen coming from the side of Pakistan and moving towards Ramgarh. They were challenged & caught by the Armed Forces. On search being made, the petitioner was found carrying ten packets of heroin in his possession weighing 1 kg. each. Similarly, other accused persons were also found carrying contrabands. He was put to trial alongwith three others for the offence under the NDPS Act. During trial, in defence, he claimed himself to be a citizen of India. He identified himself as son of Saifu resident of Khuiyala. In support of his defence, he produced DW 1 Jeetu Singh and DW 2 Moheb

Khan. The learned Special Judge, NDPS Act Cases, Jodhpur, by judgment dated 17.8.1994 convicted the petitioner and others of offence u/sec.22 of the NDPS Act and sentenced each of them to ten years' rigorous imprisonment and to pay a fine of Rs.one lac and in default of payment thereof, to further undergo two years' R.I. As regards the offence u/s.23 of the NDPS Act, the learned Judge found that even according to the prosecution witnesses, petitioner was caught at a distance of 45 kms. from the border. Thus, he was within the territory of India and there was no evidence worth the name to show that he had crossed the border. In view of the finding, he was acquitted of offence u/sec.23 of the NDPS Act. As regards offence u/sec.14 of the Act of 1946, the learned Judge observed that in absence of decision of the Central Government as to the citizenship of the detenu, penal provisions of the Act of 1946 cannot be attracted. Thus, while acquitting him of offence u/s.14 of the Act of 1946, the Court left the issue of citizenship of the petitioner open to be determined by the Central Government.

3. It is not in dispute that inspite of decision of the Court as back as in the year 1994, the Central Government has not decided the question of petitioner's citizenship, meanwhile he has undergone the full term of sentence in jail as a foreign national. While in jail, he filed a civil suit in the

court of Civil Judge (Junior Division) cum Judicial Magistrate No.2, Jodhpur seeking declaratory decree that he was citizen of India and injunction restraining the respondents from deporting him to Pakistan. It is asserted that the petitioner was not produced by the jail authorities before the trial Court for recording his statement. On completion of the sentence on 11.11.2005, instead of being released, he was handed over to police authorities. He challenged the detention by way of filing a Habeas Corpus Petition, which was registered as D.B.Habeas Corpus Petition No.6660/2005. This Court by order dated 14.11.2005 restrained the respondents from deporting him. In reply to the said petition, it was disclosed that the petitioner was detained in proceedings u/sec.109 CrPC. However, having realized that petitioner could not be detained for long in the garb of proceedings u/s.109 CrPC, the same were dropped and, as such, the Habeas Corpus Petition was made infructuous.

4. After misconceived proceedings u/s.109 CrPC being dropped, the respondents invoked provisions of the NSA, by passing impugned order of detention dated 25.1.2006. Petitioner has challenged the same on number of grounds. A counter has been filed supported by affidavit of Shri Hem Singh, presently working as Deputy S.P., C.I.D. (SB), Zone Jodhpur. A preliminary objection has been raised to the

effect that petitioner has an alternate remedy by way of approaching the Central Government under Section 13 of the Act of 1955 for determination of his citizenship. Reliance is placed on a decision of this Court rendered in Shafi Mohd. v. State of Rajasthan being D.B.Civil Special Appeal No.293/2000, wherein it is held that in case of dispute relating to citizenship, the provisions of Section 13 of the Act of 1955 are applicable and such person may approach to the Central Government under the provisions of Section 13 of the Act of 1955. It is asserted that the petitioner was never treated as Indian citizen. The actual name of the petitioner is Khania alias Fogia son of Talib alias Amad alias Saifu by caste Musalman resident of Dhaniyawala (Pakistan). According to the respondents, petitioner was caught by the Indian Army at the Indo-Pak Border between Pillar No.561 and 565 and on the joint interrogation by RAW, Military Intelligence, Custom, Border Intelligence and Intelligence Bureau, it revealed that the activities of the petitioner throughout his life have been in Pakistan. However, he has very close relations with the people in Pakistan as well as India. It is asserted that Section 3(1)(b) of the NSA empowers the Government to detain a foreign national till the process of deportation is complete. The impugned order has been passed by the Deputy Secretary to the Govt. of Rajasthan, Department of Home in exercise of powers under Sec.3(1)(b) of the NSA having satisfied that

he was required to be deported and until the said proceedings are complete, it is necessary to detain him in jail. It is also averred that name of petitioner appears in the list of foreign prisoners. The Government of India had proceeded for Consular access and the date was fixed as 26th and 27th February, 2006 at Tihar Jail, New Delhi but due to unavoidable reasons, the Consular access in the said case could not take place. It is emphatically denied that the petitioner is a citizen of India. As regards the procedure, it is submitted that a copy of the order of detention alongwith all the documents were served upon the petitioner and the same were read over and explained to him in his language. A receipt of the order dated 25.1.2006 alongwith order for grounds of detention, was also obtained from the petitioner on 27.1.2006, which is placed on record as Annex.R/8. It is further averred that the petitioner did not make any representation on his own, as such, he cannot make any grievance for non-consideration of the representation. It is also denied that the ground of detention were not explained to him.

5. Learned counsel for the petitioner has challenged the order of detention on number of grounds. We do not consider it necessary to deal with the contentions raised for the simple reason that the preliminary objection raised by the respondents deserves to be accepted.

6. It is submitted by the learned Additional Advocate General that the controversy as to whether petitioner is an Indian National or not, can be decided only by the Central Government under Section 13 of the Act of 1955. Section 13 of the Act of 1955 reads as follows:

"13. Certificate of citizenship in case of doubt:
The Central Government may, in such cases, as it thinks fit, certify that a person, with respect to whose

citizenship of India a doubt exists, is a citizen of India; and a certificate issued under this section shall, unless it is proved that it was obtained by means of fraud, false representation or concealment of any material fact, be conclusive evidence that person was such a citizen on the date thereof, but without prejudice to any evidence that he was such a citizen at an early date."

7. This Court in Shafi Mohd's case (supra) has taken the view that in case of dispute relating to citizenship, the provisions of Section 13 of the Act of 1955 are applicable and such person may approach to the Central Government under the said provisions. It is submitted by the learned counsel for the petitioner that a liberty was given to the State authorities by the learned Special Judge by judgment dated 17.8.1994 to get the controversy as to whether the petitioner is a citizen of India or not, determined by appropriate authority. In spite of judicial directions, in last 12 years, no efforts have been made by the respondents to get the controversy resolved. It is further submitted that

there is overwhelming evidence on record which positively leads to the conclusion that the petitioner is an Indian citizen. Thus, instead of relegating the petitioner to the remedy available under the Act of 1955, this Court may itself decide the controversy. There is some substance in the contention raised by the learned counsel for the petitioner as to inaction and complete misdirection of the respondents in keeping the issue alive for number of years. Though the respondents have taken a plea to get the citizenship determined under the provisions of Section 13 of the Act of 1955 but it clearly appears that the officers in the concerned department are completely ignorant as to the procedure to get the citizenship determined by the Central Government. Less said the better it is, about the knowledge and inaction on the part of officers of the concerned department. The manner in which they have dealt with the issue in last 12 years, speaks in volume about their lack of knowledge on the subject and inefficiency. However, we do not consider it to be a fit case to quash order of detention on this ground alone. It is in the larger interest of the National Security that the issue regarding the petitioner's citizenship is decided by the appropriate authority within a time-frame. It is of course true that burden may lie on the petitioner to establish that he is an Indian citizen but it is too much to expect from an illiterate person, like the petitioner, to locate the authority designated to decide such

issue and the procedure to be approached, regarding which, even the officers of the concerned departments are confused. We have specifically asked the learned Additional Advocate General for the State and learned Assistant Solicitor General for the Central Government about the designation of the concerned authority and the procedure but the response is of ignorance. Even after the order of detention in last eight months, they have not been able to do anything. Petitioner has been detained pending deportation proceedings for which, the pre-condition is the decision of the Central Government as to the citizenship of the petitioner. We are told that there are no clear guidelines in this regard, as a result large number of poor and illiterate persons are loitering around the Government offices & the concerned officers are passing time on adhoc-ism taking shelter of ipse dixit reasons. It is in the national interest to sensitize the officers concerned and make their working more transparent and orderly.

9. In view of the aforesaid, in order to secure the ends of justice, we direct as follows:

(i) The respondents are directed to get the issue as to citizenship of petitioner determined under the provisions of the Act of 1955 latest by 30th October, 2006;

(ii) It will be the duty of the incharge Deputy Secretary, Department of Home, Government of Rajasthan, who has issued the order of detention to arrange legal and other assistance to the petitioner to get the controversy as to his citizenship determined;

(iii) It will be the duty of the incharge Deputy Secretary, Department of Home, to ensure that representation of the petitioner, if required in this regard, reaches to the appropriate authority within time and that he is given full opportunity to present his case. He will also impress upon the concerned authority to determine the issue latest by the date indicated above. He will report the compliance of the order to this Court by filing affidavit before 30.10.2006;

(iv) This order is made without prejudice to the rights and contentions of the petitioner as to validity of the impugned order of detention in event of fresh challenge;

(v) In event, the issue as to petitioner's citizenship is not decided by the competent authority under the provisions of the Act of 1955 within time-frame, the order of detention shall stand quashed and the petitioner shall be released forthwith & there shall be restraint order on his deportation; and

(vi) In case, issue regarding citizenship is decided against the petitioner, it will be open for him to challenge the same in accordance with law.

10. The Habeas Corpus Petition stands disposed of as indicated above.

(R.P.VYAS), J.

(N.N.MATHUR), J.

RANKAWAT JK, PS